MOHD SALLEH SHEIKH AHMAD A

v.

YEWPAM SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, KUCHING B
DAVID WONG DAK WAH J
[SUIT NO: 22-81-2005-III(I)]
27 APRIL 2007

CIVIL PROCEDURE: *Res judicata - Estoppel - Issue estoppel - Attempt to reopen previous suit which has been adjudicated - Debt admitted to by plaintiff in earlier suit - Whether plaintiff could ignore such admission of debt in present suit* C

The plaintiff claimed against the defendants, *inter alia*, for the 3rd defendant to transfer three specified parcels of land to the plaintiff. The D plaintiff's claim was premised on the fact that in view of the decision of the Court of Appeal in a previous suit between the same litigants here (the first suit), the debt due from the plaintiff to the defendant had been extinguished by merger of the judgment in the first suit. In the first suit, the High Court had entered judgment for the first defendant making the E award of damages *in lieu* of specific performance. On appeal to the Court of Appeal the orders of the learned High Court judge were partly overruled. The plaintiff argued that the effect of the Court of Appeal's decision was that all debts due from the plaintiff to the defendant had been fully extinguished and hence the three parcels of lands must be F transferred back to the plaintiff. The defendants claimed that the Court of Appeal never overturned any finding of facts by the High Court and that all the Court of Appeal did was to set aside the order for the payment of the debt due purely on a technical ground. The defendants applied to strike out (encl. 24) the plaintiff's claim relying on a plea of *res judicata* and/or issue estoppel. The plaintiff applied for summary G judgment (encl. 32). The Senior Assistant Registrar dismissed both the summary judgment application and the defendant's application to strike out the plaintiff's statement of claim. Hence this appeal.

Held (allowing encl. 24 in part and striking out encl. 32): H

(1) The judgment of the Court of Appeal did not extinguish the finding that the plaintiff was indebted to the defendant. All the Court of Appeal did was to set aside certain orders which were anchored on the counterclaims of the plaintiff (defendant in the first suit) on a technical ground. (para 16) I

(2) In any event, the plaintiff's claims were barred by the principles of *res judicata* and issue estoppel. Prayer 1(iii) was a repetition of prayer 9 of the first suit. To allow the plaintiff to pursue this prayer would reopen the matter again and infringe the principle of *res judicata*. (paras 17 & 19)

(3) The plaintiff in the first suit had admitted the debt due to the defendants. To ignore it in this suit would be indefensible. The plaintiff could not have filed for the claim of the return of the three properties in the first suit on the ground he did not owe any money to the defendants as the evidences did not allow him to do so and that fact had not changed in the present suit. (para 21)

Case(s) referred to:
Chung Khiaw Bank (Malaysia) Bhd v. Tio Chee Hing [2004] 3 CLJ 59 CA ***(refd)***
Mohd Salleh Sheikh Ahmad v. Yewpam Sdn Bhd [2005] 4 CLJ 819 CA ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 18 r. 19, O. 92 r. 4

For the appellant - Mekanda Singh Sandhu (SS Sandhu & KS Sandhu with him); M/s MS Sandhu & Co Advocates
For the defendant - James Lo; M/s George Lo & Partners Advocates

Reported by Amutha Suppayah

JUDGMENT

David Wong Dak Wah J:

Appeals

[1] Before me are two appeals which are as follows:

1. an appeal against the Senior Assistant Registrar's (SAR) decision dated 5 December 2006 in dismissing the summary application for judgment under O. 14 RHC by the plaintiff. (encl. 32).

2. an appeal against the SAR's decision dated 5 December 2006 in dismissing the defendant's application to strike out the plaintiff's statement of claim under O. 18 r. 19 RHC (encl. 24).

[2] As these are interlocutory appeals, I am required by law to hear these appeals by way of a rehearing. At the outset of this hearing, Mr James Lo (Mr Lo), counsel for the defendant, urged the court to hear the appeal of encl. 24 first as he feels that if the court decides in

his favor there is no necessity to consider encl. 32. In my view it really does not matter as when I consider encl. 24, I will need to refer to arguments raised in encl. 32 and *vice versa*.

Statement Of Claim

[3] The plaintiff's claims against the defendants are as follow:

1. an order that the 3rd defendant do hereby transfer the three parcels of land described below to the plaintiff within 14 days from the date of the making of the order:

   (i) all that parcels of land together with the building thereon and appurtenances thereof situate at Kuching containing an area of 106.1 square metres, more or less and described as Lot 95 Section 24 Kuching Town Land District;

   (ii) all the parcels of land together with the building thereon and appurtenances thereof situate at Ewe Hai Street, Kuching containing an area of 83.3 square meters, more or less and described as Lot 34 Section 29 Kuching Town Land District; and

   (iii) all that parcels of land together with the building thereon and appurtenances thereof situate at 3rd Mile, Rock Road, Kuching containing an area of 302.5 square meters, more or less and described as Lot 2123 Section 10 Kuching Central Land District.

2. alternatively an order that the said three parcels of land shall vest in the name of the plaintiff with immediate effect.

3. an order that an account be taken of all rentals received by the defendant or the market value of rent receivable in respect of the said three parcels of land when they were used by them;

4. an order for payment by the defendant to the plaintiff of the amount to be due to him upon the taking of such account;

5. interest on the amount found due to the plaintiff on the taking of such account;

6. such further order or relief as the court deems just; and

7. costs.

[4] The above claims is premised on the fact as submitted by Mr Makenda Singh Sandhu (Mr Sandhu) that in view of the decision of the Court of Appeal in a previous suit between the same litigants here – suit 22-13-00-I (*Yewpam Sdn Bhd v. Mohd Salleh bin Sheikh Ahmad* (original action) and *Mohd Salleh bin Sheikh Ahmad v. Yewpam Sdn Bhd and Ho Kok Thin* (by counterclaim), the debt due from the plaintiff to the defendant has been extinguished by merger of the judgment in suit 22-13-00-I (First Suit).

[5] Mr Lo disagreed with that contention and had applied to strike out the plaintiff's claim pursuant to RHC O. 18 r. 19 and O. 92 r. 4. It relied on a plea of *res judicata* and/or issue estoppel, hence an assertion that the action constituted an abuse of the court's process.

[6] In rebuttal the plaintiff took out a summary application for judgment pursuant to RHC O. 14 r. 1 and O. 43 r. 1.

Both applications require me to look at the judgments of the High Court and the Court of Appeal of the First Suit and form an opinion whether the view of Mr Sandhu or Mr Lo is the correct one.

First Suit

[7] The brief facts are summarized in the judgment of Ian Chin J in the First Suit under the section 'Introduction' and for convenience I reproduce the same in verbatim:

> Yewpam Sdn Bhd ("the plaintiff") sued Mohd Salleh Bin Sheikh Ahmad ("the defendant") for specific performance and alternatively for liquidated damages of RM2,610,000 in respect of an agreement entered into between the parties on 14 November 1996 ("the 1st agreement") for, as the parties put it, the sale and delivery of 180 units of used and reconditioned cars by the defendant to the plaintiff which cars were to be imported using the approved permit that had been issued by the Ministry of Trade and Industry to the defendant. The plaintiff alleged that the defendant had failed to deliver 87 cars and hence sues for an order that the defendant delivers the same or alternatively liquidated damages of RM2,610,000 worked at a sum of RM30,000 per car which 1st agreement spelt out. The defendant delivered a defence and counterclaim that ran 19 pages and he brought in Ho Kok Thin ("Ho") as a defendant to the counterclaim.

[8] In the counterclaim the plaintiff herein prayed for the following reliefs:

> 1. A declaration that the said 1st and 2nd Agreements are moneylending transactions being harsh and unconscionable under Moneylenders Ordinance (Sarawak Cap 114) or otherwise such that a court of equity would give relief;

2. A declaration that the said 1st and 2nd Agreements are illegal, unlawful, void, unenforceable and or proper;

3. An order that the said 1st and/or 2nd Agreements and or the transactions thereof between the 1st defendant (as plaintiff in the original action) and the defendant and/or the 2nd defendant and the defendant respectively be reopened;

4. An order that an account be taken between the 1st defendant herein and the defendant and between the 2nd defendant herein and the defendant respectively;

5. An order that the defendant (as plaintiff in the counterclaim) be relieved from paying the 1st defendant (as plaintiff in the original action) herein and/or 2nd defendant herein any excess of what is fairly and reasonably due in respect of principal and interest 10 pursuant to the said loan;

6. An order that upon such account being taken, the 1st and 2nd defendant do pay to the defendant (acting as plaintiff in the counterclaim) such sum as may on the taking of the account be found to have been overpaid by the defendant;

7. An order that the said 30% share in Syarikat State Motor and/or the said House be howsoever returned or caused to be returned by the 1st and/or 2nd defendant herein by their agents, servants and/or nominees to the defendant (acting as plaintiff in the counterclaim);

8. Damages to be assessed;

9. Damages for the conversion of the said house to be assessed by the Honorable Court;

10. Costs;

11. Interest;

12. Any such further or other reliefs as this Honorable court may deem fit and or proper.

[9] After a full trial, his Lordship granted the following reliefs:

1. Judgment is entered for the Plaintiff against the Defendant for the sum of RM870,000 together with statutory interest and costs;

2. The Plaintiff shall cause to be re-transferred to the Defendant the 30% share in the firm of Syarikat State Motor;

3. An account shall be taken of the rentals of the shops and the house which the Plaintiff or Ho Kok Thin or their nominee had received or the relevant market value of the rent receivable at

A the relevant time for these properties where the properties had been used by the Plaintiff or Ho Kok Thin or their nominee;

4. These sums when found shall be regarded as an amount due from the Plaintiff to the Defendant and the Defendant shall be given credit and the balance of RM2,339,961.42 owing by the B Defendant to the Plaintiff shall be reduced accordingly and the reduced sum so found shall be regarded as a debt due from the Defendant to the Plaintiff;

5. The shops shall be sold by public auction within 90 days hereof at the reserved price of RM1,025,800.00 and it is to be free C from encumbrances.

6. The house shall be sold by public auction within 90 days hereof at the reserved price of RM254,800.

7. The Plaintiff shall cause the auctions to be conducted by a court bailiff by taking out a summons for directions for that purpose D and the Plaintiff shall bear the initial costs of the auctions.

8. The Plaintiff or Ho Kok Thin or their nominee shall be liable to discharge all the charges created against the properties to enable a transfer of the properties free from encumbrances in the event E that a party other than the Plaintiff or Ho Kok Thin or their nominee successfully bided for the properties or any of them provided that the proceeds of the sale shall first go towards satisfying the charge or charges with the Plaintiff or Ho Kok Thin or their nominee making up the deficient amount, if any.

F 9. The Plaintiff or Ho Kok Thin or their nominee shall be entitled to bid for the properties and they shall be entitled, in the event that they are successful, to off-set the amount owing by the Defendant to the Plaintiff aforesaid as payment of the bid price.

10. In the event of the Plaintiff or Ho Kok Tin or their nominee G successfully bidding for the property, the bailiff's fee shall be paid by the Plaintiff on behalf of the Defendant and such fee shall become a debt due from the Defendant to the Plaintiff in the account to be taken.

11. In the event of a successful bid by someone else, the proceeds of the sale shall be deposited with the court to be dealt with as H aforesaid and the balance, if any, shall await an order of the court.

12. The parties are at liberty to agree on the sale of the properties by private treaty at such sums and on such conditions as they may agree notwithstanding the orders I have just made. I

There will be no order as to costs for the counterclaim as on the whole the Defendant can be said to have failed though an account has been ordered to be taken but this is miniscule compared to the other counterclaims which had failed.

[10] On appeal to the Court of Appeal the orders of Ian Chin J was partly overruled. The reasons are set out by Gopal Sri Ram JCA in *Mohd Salleh Sheikh Ahmad v. Yewpam Sdn Bhd* [2005] 4 CLJ 825 at pp. 824-825:

Because of the approach we took in this appeal at the close of arguments, I find it unnecessary to deal with any of them save one. And that has to do with whether the judge was correct in making orders 3 through 12 quoted above. A careful reading of his judgment leaves no doubt that he was completely dissatisfied with the defendant's evidence. He was entirely justified in that. Even basing myself on the printed notes of evidence I find myself entirely in agreement with the judge that the defendant wholly lacked credibility. That is why the judge found the defences to be hollow and the counterclaim to lack any evidential foundation. The difficulty in this case is that having decided against the defendant on the counterclaim, he proceeded to make orders on it.

It is trite that once a counterclaim is found to be without merit the only path open to a court is to dismiss it. A court is not entitled to resurrect a dead counterclaim to found a basis for granting relief which the court considers should be granted on the facts. If that is done there is a serious risk of it being taken as an attempt at palm tree justice. Further, a prayer for relief in a counterclaim cannot be used against the defendant himself. These are indeed the complaints of Mr Wong Chong Wah of counsel for the defendant (the appellant before us). I find these complaints justified.

Learned counsel for the plaintiff (respondent before us) made a feeble attempt at justifying the orders that are the subject matter of complaint in this appeal. He said that he was entitled to rely on the defendant's counterclaim to support these orders. I have already demonstrated the futility of this argument. If the plaintiff wanted the kind of orders the judge made, it should have amended its statement of claim to include them. It could not rely on the defendant's counterclaim to obtain relief against the defendant himself. Also, the plaintiff could not, when delivering its reply and defence to counterclaim, have added a counterclaim to the defendant's counterclaim since it was already a party to the action. That avenue is open only to a defendant to the counterclaim who is not already a party in the main action.

So far as the first order is concerned, the judge was amply justified in making the award of damages in lieu of specific performance having satisfied himself that the claim had been made out on the evidence.

A Next, the second order, though not claimed by the plaintiff is a necessary adjunct and hence a consequential order. No complaint may be made about it. In fact there is no complaint about it. That is hardly surprising.

After all, the High Court here was being moved for equitable relief in
B the form of specific enforcement. When considering the grant of specific relief the High Court, as a Court of Equity, is entitled to grant alternative relief or to impose conditions (as was done in *Solle v. Butcher* [1949] 2 All ER 1107) or to require an equitable adjustment to be made between the parties ...

C The second order made by the learned judge is plainly supportable on this basis.

For the reasons already given, the appeal was allowed in part. Orders (1) and (2) were affirmed. The orders (3) through (12) were set aside. The appellant was given its costs of the appeal.

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[11] The effect of the Court of Appeal's decision as far as Mr Sandhu was concerned is that all debts due from the plaintiff to the defendant had been fully extinguished. This is how he puts it in his plaintiff's outline submission (encl. 93) at pp. 7-9:

E Effect of reversal of findings

4.3 It is submitted that the legal consequences of the decision in the previous suit of the High Court allowing the alternative prayer of damages of RM870,000.00 *in lieu* of specific performance (which is the only order remaining in favour of the Defendants) are as
F follows:

(a) by reasons of the award of damages, the Defendants are deemed to have elected for damages for breach of agreement in place of alternative remedy of specific performance, thus the debt under the agreement has merged in the judgment
G and the Defendants can only enforce the award of damages;

See: Jones & Goodheart on *Specific Performance* at page 232 *United Australia Ltd. v. Barelays Bank Ltd.* [1940] 4 All E. R. 20 at page 236

H (b) further by the award of damages, the court is deemed to have terminated the agreement between the parties and the obligations of parties under the agreement have ended and their affairs are regulated by the judgment.

See: *Moschi v. Lep Air Services Ltd. & Anor* [1972] 2 All E.R. 393
I at 402-403

Asia Commercial Finance (M) Bhd v. Kurval Teliti Sdn. Bhd. [1995] 3 MLJ 189 at 202

(c) as a consequence, the judgment in the previous suit has given rise to a new cause of action pleaded in paragraph 17, namely, extinguishment of the debt by merger in the judgment, as follows:

17. By reason of the matters stated below, the Plaintiff's debt to the 1st Defendant under the First Agreement and the 2nd Agreement has been extinguished by merger in the judgment given in Suit No. 22-13-2001-I or, alternatively has been fully discharged and the 3rd Defendant is under a duty to re-transfer the said three parcels of land to the Plaintiff and/or cannot remain as the registered proprietor or expropriate them for her own benefit or for the benefit of the 1st Defendant and/or 2nd Defendant.

For detailed submission on the above consequences of the decision, see Plaintiff's Submissions dated 28.9.2006 in Enclosure 24 paragraphs 4.1 to 4.3 and subparagraphs thereunder.

Express provisions on repayment of debt and compensation

4.4 It is submitted that the conclusion that the debt under the 1st and 2nd Agreements merged in the award of damages in the previous suit is also supported by the terms of 1st and 15 2nd Agreements as should be apparent from the analysis below:

- by virtue of the final recital and clause 1 of the 1st Agreement, the transaction under the 1st Agreement was the loan and the delivery of the units of vehicles was to be made in repayment of the loan;

- the failure to deliver vehicles as agreed by the plaintiff (which correspondingly meant failure to repay the loan) constituted a fundamental breach entitling the 1st Defendant to claim compensation under clause 10 of the 1st Agreement;

- thus, the compensation recovered under clause 10 would 10 be in respect of or cover both the non-delivery of vehicles and the repayment of loan and the money realized thereunder would have to be credited in full and final settlement of the loan;

- by the previous suit, the Plaintiff claimed from the Defendant "liquidated damages *in lieu* of specific performance of RM30,000.00 on 87 undelivered units, totaling RM2,610,000.00". (See paragraph 4 of the Statement of Claim and prayer B indorsed in the Writ of Summons exhibited as H-3 to Ho's Supporting Affidavit in encl. 24).

- in the above premises, by reason of the award in the previous suit of RM870,000 as compensation, there can be no further claim for debt under the agreements, otherwise the 1st Defendant would have double satisfaction which is not permissible in law;

- the Defendants have received the sum of RM968,009.50 towards satisfaction of the judgment (see paragraph 21 of Ho's Supporting Affidavit in Encl. 24); and

- it follows that, since the Plaintiff's obligation to repay the debt under the 1st and 2nd Agreements having been terminated by merger in the judgment, the 3rd Defendant as nominee of 2nd Defendant is under a legal obligation pursuant to Clause 5 of 2nd Agreement to retransfer the lands in question and to account for rentals received.

[12] In short, the finding by Ian Chin J of the sum of RM2,339,961.42 due by the plaintiff to the defendant had been extinguished by the judgment of the Court of Appeal and hence the three parcels of lands must now be transferred back to the plaintiff.

[13] In reply, Mr Lo pointed out that the Court of Appeal never overturned any finding of facts by Ian Chin J. All the Court of Appeal did was set aside the order for the payment of the debt due purely on the technical ground that once the counterclaim is found to be without merits, the same must be dismissed and cannot be used to grant any relief for the favorable party. As for the submission that the plaintiff's cause of action is premised on the Court of Appeal judgment, Mr Lo submitted that this is an artificial argument as "the bottom line is really that the plaintiff does not owe any money to the defendant which it is not something new.

Findings Of The Court

[14] Ian Chin J wrote a 61 page judgment which considered every conceivable points raised by the plaintiff's then counsel in the first suit, Mr Shanker Ram. For my purpose, I take note of the fact that the plaintiff (the defendant in the first suit) was found to be not a witness of truth. In his judgment, His Lordship said:

> … This means the defendant was lying. My conclusion is fortified by the fact that though he enlisted the services of a documents examiner to examine other documents in this case (which he also alleged were forged) yet he did not refer to the first page of the 2nd Agreement to the documents examiner to get an opinion to support his allegations of spoliation and forgery … The defendant swung left right and centre but missing on all. He is a witness who simply alleged what comes to mind if it serves his purpose. He is not credible witness at all.

[15] Gopal Sri Ram JCA upheld the above findings when he agreed that 'the defendant wholly lacked credibility" and "the defences to be hollow and the counterclaim to lack any evidential foundation".

[16] Having read the judgments of Ian Chin J, the Court of Appeal and the affidavits together with documents filed with utmost care, I with respect cannot agree with the contention that the judgment of the Court of Appeal had in effect extinguished the finding that the plaintiff is indebted to the defendant in the sum of RM2,339,961.42. In my view, all the Court of Appeal did was to set aside certain orders which were anchored on the counterclaims of the plaintiff (defendant in the first suit) on the technical ground that once the counterclaims had been found to be baseless, the only option was to dismiss it. It must also be noted that Ian Chin J's award of damage was only in respect of the profit which the 1st defendant would have made and had nothing to do with the repayment of the outstanding loan. This is what he said at p. 36:

> Given the fact that the parties are not in dispute that the resale of imported vehicles is a profitable business and that the Plaintiff had given undisputed evidence that he had made profit before, one can assume that profit can be made. More so, when the Defendant had said in evidence that the Plaintiff; "definitely he can make profit". Though the Plaintiff had said that the loss of profit is between RM10,000 to RM20,000 the Plaintiff has failed to back up his claim with sale invoices which could have easily been done. In the absence of those invoices, I have to conclude that there is no substance in the Plaintiff's contention. But it does not mean that if there was no market for imported cars in 1997 or 1999 that there should be no market also for the subsequent years. It will be remembered that the obligation of the Defendant to allow the Plaintiff to use the approved permit to import vehicles was only extinguished after the full 180 units had been imported even though it may extend beyond the 3 year period. Therefore, the possibility exists for the market to improve in the year 2000 or thereafter. This means that the Plaintiff could still make a profit from the sale of imported cars. In this regard, I am prepared to accept the Plaintiff's assertion that a profit of RM10,000 could be made by the sale of each imported vehicle. If the Plaintiff had wanted the RM20,000 (which is the upper range of the profit he said he had made apart from the lowest range of RM10,000) the Plaintiff should have produced the invoices and other documents to prove that but he had failed to do so. This means the damages in the form of the loss of profit would be RM870,000 (87 vehicles x RM10,000).

This part of the judgment was never overruled by the Court of Appeal which in my view confirms that there cannot be any merger of the debt.

Principles Of *Res Judicata* And Issue Estoppel

[17] Even assuming I was wrong in my conclusion, the plaintiff's claims are barred by the principles of *res judicata* and issue estoppel which form the whole basis of encl. 24. In dealing with this issue, I am guided by the approach taken by the Court of Appeal in the case of *Chung Khiaw Bank (Malaysia) Bhd v. Tio Chee Hing* [2004] 3 CLJ 59 where at p. 62 said:

> The appellant then applied to strike out the respondent's claim pursuant to RHC O. 18 r. 19. It relied on several grounds. These included a plea of *res judicata* and an assertion that the action constituted an abuse of the court's process. As a matter of law, the latter ground is much wider than the former. A party to any proceedings may be unable to establish the requirements of the doctrine of *res judicata*. Yet, he may succeed in demonstrating that the particular suit or other proceeding or a step taken in a proceeding is an abuse of process and successfully apply to have it struck out on that ground. This was made clear by the Supreme Court in *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256. Abdoolcader SCJ who delivered the judgment of the court said:
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> > There is moreover the inherent jurisdiction of the court in cases where *res judicata* is not strictly established, and where estoppel per *rem judicatam* has not been sufficiently pleaded, or made out, but nevertheless the circumstances are such as to render any re-agitation of the questions formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action, or stay proceedings therein, or strike out the defence thereto, as the case may require. It would suffice in this regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and Myer Shopping Centres Pty Ltd v. Attorney-General for Queensland* [1979] AC 411, 425.
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> > The second defence is one of "*res judicata*". There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wilgram V-C in *Henderson v. Henderson* [1843] 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v. Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd* [1975] AC 581. It was, in the judgment of the Board, there described in these words:

> … there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. (p. 590).

The attempt by way of the instant proceedings to re-litigate and reopen the earlier action clearly reflects the appositeness of the caption suggested for this matter in the prelude to this judgment and would appear to us to be as clear an instance of an abuse of the process of the court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in *Hunter v. Chief Constable of the West Midlands Police & Ors* [1982] AC 529, 542 ...

One manifestation of this power was to be found in RSC Ord 18, r. 19, which empowered the court, at any stage of the proceedings, to strike out any pleading which disclosed no reasonable cause of action or defence, or which was scandalous, frivolous or vexatious, or which was otherwise an abuse of the process of the court.'

Where an abuse of process is alleged in reliance upon or in relation to any previous litigation between the parties or their privies, it is the duty of the court to undertake a minute examination of the history of the prior litigation. To do this does not offend O. 18 r. 19 in this particular context. As Peh Swee Chin SCJ said in *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606, another abuse of process case:

> However, the learned judge in the court below, who is very experienced and very able, and who referred very much to the same issues, appears to be much exercised by the fact that the application was made under O. 18 r. 19, in reversing the learned registrar's decision, in holding, 'On the facts of this case I consider that O. 18 r. 19 is not appropriate to shut out the plaintiffs from pursuing their claims.

The cautionary words are words which have been frequently employed in connection with an application under O. 14. It was unfortunate that the case of *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1, a Privy Council case was not cited in the court below, though it was cited to us here. In Tractors, defendants applied to set aside the pleadings there on the grounds that they were frivolous and vexatious. The High Court allowed the application holding that the action was bound to fail. The Federal Court, on appeal, regarded themselves as precluded from examining the evidence for determining whether the action was bound to fail. The Privy Council held that the Federal Court was in error for not examining the evidence and deciding as to whether the action there was bound to fail, though the power to dismiss an action summarily was a drastic power. The Privy Council went through the evidence with a fine-tooth comb and decided to agree with the learned judge at the first instance and restored the

A High Court's decision. It is to be remembered that the High Court always has an inherent jurisdiction to prevent abuse of its process irrespective of whether it is expressly called for or not in an application under O. 18 r. 19 unless such application is limited solely to the ground that any pleading does not disclose a reasonable cause of action or defence as the case may be. (emphasis added.)

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The present case, as we have already said, has a long history. Part of that history includes an earlier action in which the respondent mounted a claim based on fraud against the appellant. It was titled as Suit No. S 117/1982. An application to strike out that action failed at first instance. But it succeeded on appeal. In the Supreme Court, Wan Suleiman SCJ examined the preceding history of the litigation between the parties. See, *Chung Khiaw Bank Ltd v. Tio Chee Hing* [1987] 1 CLJ 531; [1987] CLJ (Rep) 81. The relevant passage in the judgment of his Lordship reads as follows:

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> Appellants registered the first charge on August 14, 1968, (Memorial No. 92666) and the second charge on August 13, 1986. Tio complains that the appellants had fraudulently obtained the first charge. In paragraphs 9 and 10 of his statement of claim he set out the particulars of his charge of fraud alleging that the appellants had no intention of providing money under that charge, no account was opened for it and no money was paid under it. Appellants had, he added, consistently refused to provide evidence of money allegedly provided under the first charge, and had tricked him into executing the two charges and the appellants had made dishonest use of the first charge and purported to realise it even though no loan had been made under it. His Lordship noted that paragraph 11 of the statement of claim alleged that appellants took unfair advantage of Tio's financial difficulties in executing the first and second charge and struck an unconscionable bargain.

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His Lordship then concluded the opinion of the court in the following terms:

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> Having therefore given careful consideration to the whole history of this unfortunate affair we must, with respect, say that the learned Judge had erred in not holding that this suit brought by the respondent Tio discloses no reasonable cause of action and is vexatious and an abuse of the process of the court. (emphasis added.)

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A comparison of the respondent's pleaded case in Suit S 117/1982 and in the present action reveals that they are in essence the same. What the respondent is attempting to do in the present case is to avoid liability in respect of the charge dated 14 August 1968 registered under Memorial No. 92666 on the ground that he never received the funds

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promised by the appellant bank. If you read Wan Suleiman SCJ's judgment in *Chung Khiaw Bank Ltd v. Tio Chee Hing*, you will find that the respondent had by that time made several similar attempts in other proceedings.

[18] The principle distilled from the above is that in an application of this nature, it is incumbent on the court to look at the history of the litigation between the litigants which I now proceed to do. I have carefully compared the claims of the first suit and the present suit and also read the numerous affidavits and counsels' submissions of the two suits made and came to the following findings:

[19] Firstly, prayer 1(iii) is a repetition of prayer 9 of the first suit. To allow the plaintiff to pursue this prayer would reopen the matter again and infringe the principle of *res judicata*.

[20] Secondly, as for the other two properties set out in prayers 1(i) and (ii), I concede that there was no such specific claim in the first suit. But that would be a superficial approach to the issue at hand. It is required of me to look into the history of the litigation between the parties which I do now. The 2nd agreement between the plaintiff and the 2nd defendant dated 19 october 1998 specifically made mention of Lots 95 and 34 and the plaintiff in fact in that case tried to avoid the 2nd agreement on numerous grounds which Ian Chin J rejected. One can see that the plaintiff in the First suit wanted to get out of his obligations under 1st and 2nd agreements. By doing that, he had impliedly wanted to have the three properties transferred back to him, except that he then used different grounds than what he is doing here. And the reason is obvious. This is clear from the submission of Mr Shanker Ram in the first suit (exh. H11 in encl. 24), which submission ran to 61 pages. Further as pointed out by Mr Lo, the plaintiff in his evidence under cross examination (exh. H14 in encl. 24) in the first suit had admitted the debt and this is what transpired in court:

Put: That is in breach of PA4, clause 5(i)

A: I do not agree. Since I have delivered 75 units to PW1 and further more I have signed a blank transfer of the 3 properties to him, I strongly believe my properties is enough to cover the balance still outstanding.

[21] With such clear evidence, do I have the liberty to completely ignore it? The answer is an obvious no. This is a blatant admission of the debt due to the defendants and in my view to ignore it in this suit would be indefensible. As stated earlier, the decision of the Court of Appeal never overruled that evidence. He could not have filed for the

claim of the return of the three properties in the first suit on the ground he did not owe any money to the defendants as the evidences did not allow him to do so and that fact had not changed in the present suit.

[22] Accordingly I find that the plaintiff's suit is clearly an attempt to reopen the first suit which in law is prohibited.

[23] Finally and admittedly it can be said that *prima facie* the decision of the Court of Appeal had left the litigants 'hanging in the air' so to speak. But if one looks deeper into the implications, there is no 'unfinished business' between the litigants. In fact what Ian Chin J did was to tidy up what he perceived was unfinished business. There is no unfinished business for the simple reason that the plaintiff presently is in debt to the 1st defendant and such debt is covered by the three properties in the hands of the 3rd defendant. There is no legal impediment to the plaintiff to reclaim the three properties provided he satisfies the debt due to the 1st defendant.

[24] Even if the plaintiff's claims are not covered by the principle of *res judicata*, it is covered by the principle of issue estoppel.

[25] For all the reasons stated above, I set aside the decision of the Senior Assistant Registrar and make the following orders:

1. Prayers 1 and 2 of encl. 24 are allowed with costs to be taxed unless agreed to the defendants.

2. Enclosure 32 is struck out with costs to be taxed unless agreed to the defendants